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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights defenders

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the present report submitted by the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in accordance with General Assembly resolution 62/152.

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Report of the Special Rapporteur on the situation of human rights defenders

Summary

The present report focuses on the right to freedom of association, the content of the right and its implementation in practice. The report builds upon and deepens interrelated issues addressed in previous reports, including the report of the former Special Representative of the Secretary-General on human rights defenders (A/59/401) to the General Assembly at its fifty-ninth session.

The introductory part of the report sets out the reasons for revisiting the subject of the right to freedom of association after five years of the submission of the previous report.

In the first part of the report the Special Rapporteur provides an analysis of the legal framework for the protection of the right to freedom of association at the international and regional levels. She describes the scope and content of the right and analyses what constitutes permissible restrictions.

The second part of the report depicts the case law and work of the monitoring mechanisms. The Special Rapporteur illustrates cases presented to both international and regional mechanisms and shows how the different systems complement and reinforce each other. Decisions of the Human Rights Committee, the African Commission of Human Rights, the Inter-American Court of Human Rights and the European Court of Human Rights help demonstrate the scope and content of the right to freedom of association.

In the third part of the report the Special Rapporteur shows the main trends in the implementation of the right to freedom of association, including the difficulties in the formation and registration of human rights associations and criminal sanctions for unregistered activities; the denial of registration and deregistration; and burdensome and lengthy registration procedures. She also gives examples of restriction on the registration of international NGOs, of government supervision and monitoring and of administrative and judicial harassment. Finally, the report provides examples on the restrictions on the access to funding.

The report concludes with examples of good practices and recommendations addressing the concerns and gaps identified.

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I. Introduction

1. The present report is the second one submitted to the General Assembly by the Special Rapporteur on the situation of human rights defenders and the ninth submitted in fulfilment of the mandate on the situation of human rights defenders since its establishment in 2000. The report is submitted pursuant to General Assembly resolution 62/152.

2. The mandate on the situation of human rights defenders was reviewed by the Human Rights Council at its seventh session, in March 2008, when the new Special Rapporteur was appointed. She took up her functions on 1 May 2008.

3. The present report is an update of the report submitted in 2004 to the General Assembly by Hina Jilani, former Special Representative of the Secretary-General on the situation of human rights defenders.[1] In that report the Special Representative provided a detailed overview of difficulties in the creation and registration of human rights associations; of State scrutiny of the management and activities of NGOs; of administrative and judicial harassment and grounds and procedures for dissolution; and of restrictions on funding.

4. The Special Rapporteur is of the opinion that developments of the past five years, since the submission of the report of the former Special Representative, have witnessed major changes both in terms of legislation on NGO activities and States' practice regarding the right to freedom of association, and that therefore a follow-up is warranted.

5. The Special Rapporteur also wishes to provide an analysis of the relevant legal framework, both at the international and regional levels, of the right to freedom of association. In this respect, the report contains an overview of the jurisprudence of international and regional mechanisms in applying the relevant framework and setting out the content of the right to freedom of association.

6. The Special Rapporteur wishes to express her serious concern regarding developments in national legislations concerning the functioning of non-governmental organizations. In the past five years, since the publication of the previous report on the subject, there has been a growing trend in the adoption of restrictive laws governing the functioning of NGOs, aimed at the disruption, and in some cases the complete elimination of their work.

II. Legal framework and monitoring mechanisms

7. The right to freedom of association is recognized in several international and regional instruments of binding and non-binding nature. The protection of the right to freedom of association is fundamental to any democratic society, as there is a direct relationship between democracy, pluralism and the freedom of association.[2]

8. Although the right to freedom of association was first codified at the international level in the International Covenant on Civil and Political Rights,[3] this

[1] A/59/401.

[2] The European Court of Human Rights has reaffirmed this relationship on numerous occasions; see for example *Gorzelik and others v. Poland*, No. 44158/98, para. 88.

[3] See General Assembly resolution 2200 A (XXI), annex.

codification largely builds on previous achievements in this field, especially by the Universal Declaration of Human Rights[4] and various International Labour Organization Conventions adopted on the subject.

9. Article 20 of the Universal Declaration of Human Rights declared that everyone has the right to peaceful assembly and association; and that no one may be compelled to belong to an association.

10. It is evident from the formulation of the Declaration that freedom of association and freedom of assembly are closely related. The proposal to treat them jointly in the International Covenant on Civil and Political Rights as well was however defeated.[5] The two rights are nevertheless closely related, which is further evidenced by their formulation and practical application.

11. Article 22 of the International Covenant on Civil and Political Rights states:

> "1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> "2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
>
> "3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

12. Freedom of association lies in the overlapping zone between civil and political rights.[5] As a civil right it grants protection against arbitrary interference by the State or private agents, when, for whatever reason and whatever purpose, an individual wishes to associate with others, or has already done so. As a political right it is indispensable for the existence and functioning of democracy, since political interests can be effectively championed only in community with others.

13. Article 22 also guarantees a traditional economic right: the freedom of trade unions. Although the right to form and join trade unions is regulated in article 8 of the International Covenant on Economic, Social and Cultural Rights, it was additionally guaranteed in article 22 in order to emphasize that it is not only an economic, but also a civil, right.[6]

14. Convention No. 87 on freedom of association and the right to organize of the International Labour Organization (ILO) states in its Article 2 that:

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[4] See General Assembly resolution 217 A (III).

[5] Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, p. 496, 2nd revised edition (N.P. Engel, 2005), p. 496.

[6] Ibid., p. 497.

> "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."

15. The right to freedom of association, in the context of the work of human rights defenders, is also contained in article 5 of the Declaration on human rights defenders:[7]

> "For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:
>
> [...]
>
> (b) to form, join and participate in non-governmental organizations, associations or groups."

16. Similar formulations can be found in instruments adopted at the regional level. Article 11, paragraph 1, of the European Convention on Human Rights; article 10, paragraph 1, of the African Charter on Human and Peoples' Rights; article 16 of the American Convention on Human Rights; and article 28 of the Arab Charter on Human Rights all guarantee the right to freedom of association with others.

17. The European Convention on Human Rights covers freedom of assembly and association together, similar to the Universal Declaration of Human Rights. It states, in article 11, paragraph 1, that:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> "2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

18. The African Charter on Human and Peoples' Rights, in article 10, paragraph 1, provides that "every individual shall have the right to free association provided that he abides by the law". Although in other instruments the purpose of the association is not specified, the American Convention on Human Rights, in article 16, includes a non-exhaustive list of possible purposes associations may pursue, such as ideological, religious, political, economic, labour, social, cultural, sports or others.

A. Scope and content of the right to freedom of association

19. Freedom of association is generally defined as the right to associate with others to pursue a common interest.[8] The former European Commission of Human

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[7] The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (resolution 53/144, annex).

[8] S. Joseph, J. Schultz, M. Castan, *The International Covenant on Civil and Political Rights: cases, materials and commentary* (Oxford University Press, 2000).

Rights defined freedom of association as follows: "Freedom of association is a general capacity for the citizens to join without undue interference by the State in associations in order to attain various ends".[9] The European Court of Human Rights made it clear in its case law that article 11 does not seek to protect a mere gathering of people desirous of "sharing each others company"; it follows that, in order for it to be an association, some kind of institutional structure is required, even if it is only an informal one.[10]

20. Article 22 of the International Covenant on Civil and Political Rights does not expressly list the possible purposes an association may pursue. It is assumed that the protective scope of this article is broad. Religious societies, political parties, commercial undertakings and trade unions are as protected by article 22 as are cultural or human rights organizations, soccer clubs or associations of stamp collectors.[11]

21. In order to fall under the scope of article 22, associations do not need to assume a legal personality, de facto associations are equally protected. However, as mentioned above, some kind of institutional structure is required, even with de facto organizations.

22. Freedom of association under the provisions of article 22 of the International Covenant on Civil and Political Rights means a right of the individual to found an association with like-minded persons or to join an already existing one. At the same time, it also covers the collective right of an existing association to perform activities in pursuit of the common interests of its members. States parties cannot therefore prohibit or otherwise interfere with the founding of associations or their activities.[12] This was further stressed by the European Court of Human Rights when it proclaimed that "the right guaranteed by article 11 would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association [...]. It follows that the protection afforded by article 11 lasts for an association's entire life [...]".[13]

23. Besides its individual and collective dimensions, freedom of association also has a positive and a negative aspect: the right to associate, and the freedom not to associate with others. Article 22 emphasizes the right to freedom of association, which means that the formation of and membership in an association must be voluntary. Compulsory membership in an association, the so-called closed-shop agreements, contravene the notion of freedom of association. This also implies the freedom to choose the organizations to which one wishes to belong. When a country has only one organization for promoting human rights but an individual is not in agreement with its methods and objectives, his or her freedom of association is not exhausted simply because he or she is not forced to join this organization. On the contrary, article 22, paragraph 1, also guarantees the right to found a second human

[9] "Freedom of association, Thematic monitoring report presented by the Secretary General and decisions on follow-up action taken by the Committee of Ministers". CM Monitor 2005, volume I final revised, 11 October 2005, para. 1.b.4

[10] Ibid., para. 1.a.5.

[11] Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, p. 497, 2nd revised edition (N. P. Engel 2005).

[12] Ibid., p. 498.

[13] *United Communist Party of Turkey and Others v. Turkey*, No. 19392/92, para. 33, European Court of Human Rights 1998-I.

rights organization with other like-minded persons.[14] Therefore, a situation where the authorities do not allow the establishment of a new organization on the basis that one already exists in the same area is not fully compliant with this right and should be justified upon one of the grounds provided in article 22, paragraph 2, of the International Covenant on Civil and Political Rights.[15]

24. Article 5 of the Declaration on human rights defenders states:

> "For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:
>
> [...]
>
> (b) to form, join and participate in non-governmental organizations, associations or groups."

25. By referring to the right of everyone to participate in non-governmental organizations, the Declaration further reinforces the implicit collective dimension of associations to perform activities in pursuit of the common interests of its members, free from undue interference from the State.

B. Permissible restrictions on the right to freedom of association

26. The right to freedom of association is not absolute; it is subject to limitations similar to other such clauses in the Covenant and regional human rights instruments. Article 22, paragraph 2, specifically details the requirements for such limitations to be admissible. For any restriction on the right to freedom of association to be valid, it must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be necessary in a democratic society for achieving one of these purposes. Such limitations may be imposed in the interest of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Prescribed by law

27. Any restriction on the right to freedom of association is only permissible when all these conditions are met. The term "prescribed by law" makes it clear that restrictions on the right to freedom of assembly are only valid if it had been introduced by law (through an act of Parliament or an equivalent unwritten norm of common law), and are not permissible if introduced through government decrees or other similar administrative orders. It would seem reasonable to presume that an interference is only "prescribed by law" if it derives from any duly promulgated law, regulation, decree, order, or decision of an adjudicative body. By contrast, acts by governmental officials that are *ultra vires* would seem not to be "prescribed by law", at least if they are invalid as a result.[16]

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[14] Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, p. 500, 2nd revised edition (N. P. Engel 2005).

[15] Right to freedom of association — Human rights defenders briefing paper series, April 2009, International Service for Human Rights, part I.1.

[16] Leon E. Irish, Karla W. Simon, "Freedom of Association: Recent developments regarding the 'Neglected Right'", *International Journal of Non-Profit Law*, vol. 3, Issue 2, December 2000.

Necessary in a democratic society

28. Furthermore, restrictions must be "necessary in a democratic society", which indicates that "the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favourably received by the government or the majority of the population, is one of the foundations of a democratic society. Therefore, the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose".[17]

29. Ideas that "offend, shock, or disturb" are protected under the right of freedom of expression. Thus, associations that take controversial positions or criticize the Government in ways that "offend, shock or disturb" are fully protected under the Convention. In short, associations in effect enjoy fully the freedom of expression. This is a crucial part of what is required for a "democratic society" to exist. The principle of proportionality further requires a careful balancing of the intensity of a measure with the specific reason for interference.[18]

Legitimate purposes for interference

30. The only grounds upon which an interference with the freedom of association that is prescribed by law can be justified is if the interference in question is in pursuance of "legitimate aims", which require that it be: in the interests of national security or public safety; public order (ordre public); the protection of public health or morals, or the protection of rights and freedoms of others.[19]

III. Jurisprudence and positions of the Human Rights Committee and regional human rights mechanisms

A. Right to freedom of association in the work of the Human Rights Committee

31. The Committee has not yet issued a general comment on freedom of association, and has dealt with only a relatively few such cases in its jurisprudence. Even those decisions relate mostly to cases other than non-governmental organizations or associations. One of the cases[20] dealt with the right to strike and whether an existing Canadian law prohibiting provincial employees the right to strike violated their right to freedom of association. Another case before the

[17] Case No. 1119/2002, *Lee vs The Republic of Korea*, 824 HRC 2005 Report, vol. II, annex V, sect. U, paras 7.2.-7.3.

[18] Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, p. 505, 2nd revised edition (N. P. Engel 2005).

[19] See International Covenant on Civil and Political Rights, art. 22, para. 2.

[20] Case no. 118/1982, *J. B. et al v. Canada*, HRC 1986 Report, annex IX, sect. B, para. 6.4.

Committee related to the imposition of annual membership fees on a hotel by a regional chamber of commerce.[21]

32. In a more relevant case the author claimed that his conviction for membership in the Korean Federation of Student Councils constituted an unreasonable restriction of his freedom of association.[22] The conclusions of the Committee contained very valuable insights into the requirement of "necessary in a democratic society" cited earlier, and regarding the existence and functioning of a plurality of associations in a democratic society.

B. Jurisprudence of the African Commission of Human Rights

33. The Commission has devoted considerable attention to freedom of association, which has played a crucial role in the ongoing democratization process in Africa and which is frequently still under threat from many State parties.[23] The Commission also devoted one of its resolutions[24] to freedom of association, considering that "the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards"[24] and that "[i]n regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom".[24]

34. In a communication lodged against a decree of the Government of Nigeria, the Commission found that freedom of association had been violated. In the decree in question the Government of Nigeria provided the Nigerian Bar Association with a new governing body (Body of Benchers) and laid down that 97 of the 128 members constituting this body would be appointed by the Government.

35. The Commission observed:

> "Freedom of association is enunciated as an individual right and it is first and foremost a duty for the State to abstain from intervening with the free formation of associations. There must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards."[25]

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[21] Case No. 1002/2001, *Wallman v. Austria*, Human Rights Committee 2004 Report, vol. II, sect. W, paras. 9.3-9.5.

[22] Case no. 1119/2002, *Lee v. The Republic of Korea*, HRC 2005 Report, vol. II, annex V, sect. U, paras. 7.2-2.3.

[23] Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (Martinus Nijhoff Publishers 2003).

[24] African Commission on Human and Peoples' Rights, resolution 5 (XI) 92: Resolution on the right to freedom of association (1992).

[25] Communication 101/93, *Civil Liberties Organization in respect of the Nigerian Bar Association v. Nigeria*, 8th Annual Activity Report of the Commission, para. 17 (retrieved from http://www1.umn.edu/humanrts/africa/comcases/101-93.html).

36. It also considered that since the Body of Benchers was dominated by representatives of the Government, and had wide discretionary powers, it interfered with the right to free association of the Nigerian Bar Association.

37. Since its communication in the *Civil Liberties Organization in respect of the Nigerian Bar Association v. Nigeria* case, the Commission has not developed its interpretation of article 10 further. It has concluded that the article had been violated in relation to two other communications, lodged against Nigeria[26] and Zambia.[27] In the Nigeria case the Commission found that the clear prejudice demonstrated by the Government against the organization Movement for the Survival of the Ogoni People (MOSOP) amounted to a violation of article 10, paragraph 1, of the African Charter on Human and Peoples' Rights.[28]

38. The Special Rapporteur of the African Commission on Human and Peoples' Rights on human rights defenders in Africa, Reine Alapini-Gansou, confirmed in her latest report that

> "[f]reedom of association is unfortunately still not a reality and remains, in most of the countries, a real problem germane to its translation into law and to its actual execution. Such is the case in Togo, in Angola, in Tunisia, and in several other countries on our continent."[29]

C. Jurisprudence of the Inter-American Court of Human Rights

39. The Inter-American Court of Human Rights dealt with the right to freedom of association mainly in cases related to trade union activities, which however have important implications related to the content of this right beyond trade unions. In the most recent case the Court dealt with the summary execution of a human rights defender and summarized the jurisprudence of the Court regarding article 16 of the American Convention on Human Rights.

40. In *Baena-Ricardo et al. v. Panama*, the Court held that "in labour union matters, freedom of association consists basically of the ability to constitute labour union organisations, and to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right".[30] The Court further held that the massive dismissal of labour union leaders and workers because of the 5 December 1990, work stoppage, did not meet the requirement of being "necessary in a democratic society".

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[26] Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria*, 12th Annual Activity Report of the Commission, 1998/1999, p. 72, para. 108.

[27] Communication 212/98, *Amnesty International v. Zambia*, 12th Annual Report of the Commission, 1998/1999, p. 81, para. 49.

[28] Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria*, 12th Annual Report of the Commission, 1998/1999, p. 72, para. 108.

[29] Intersession Report by Reine Alapini-Gansou, Special Rapporteur on the rights of human rights defenders in Africa, May 2008-November 2009.

[30] Case of *Baena-Ricardo et al. v. Panama*, Judgment of 2 February 2001, of the Inter-American Court of Human Rights, para. 156.

41. In *Huilca-Tecse v. Peru*, the Court was of the opinion that "the execution of a trade union leader [...] not only restricts the freedom of association of an individual, but also the right and freedom of a determined group to associate freely, without fear".[31] The Court further elaborated on the two dimensions of the freedom of association. It held that "in its individual dimension, labour-related freedom of association is not exhausted by the theoretical recognition of the right to form trade unions, but also corresponds, inseparably, to the right to use any appropriate means to exercise this freedom. [...] In its social dimension, freedom of association is a mechanism that allows the members of a labour collectivity or group to achieve certain objectives together and to obtain benefits for themselves".[32] The Court also observed that "the State must ensure that people can freely exercise their freedom of association without fear of being subjected to some kind of violence, otherwise the ability of groups to organize themselves to protect their interests could be limited".[33]

42. In *Cantoral-Huzamani and Garcia-Santa Cruz v. Peru*, the Court, among other issues, addressed the negative and positive obligations of the State arising from article 16. States not only have to refrain from limiting or obstructing the exercise of this right, but also have positive obligations, such as "to prevent attacks on it, to protect those who exercise it and to investigate violations".[34]

43. In *Kawas Fernández v. Honduras*, the Court summarized its jurisprudence regarding the right to freedom of association. It confirmed its previous views regarding the negative and positive obligations deriving from the right to freedom of association, including the obligation to prevent violations of the right to freedom of association, to protect those exercising this right and to investigate violations of this right. The Court also "established that States have a duty to provide the necessary means so that human rights defenders can freely carry out their activities; to protect them when they are the subject of threats so to avoid attacks on their lives or integrity; to abstain from putting obstacles in their way that might make their work more difficult, and to seriously and efficiently investigate any violations committed against them, thus combating impunity".[35] The Court further stressed that article 16 covers the right of every individual to form and freely participate in organizations, associations and non-governmental groups with the purpose of observing, denouncing/reporting, and promoting human rights. Given the importance of the role that human rights defenders play in democratic societies, the free and full exercise of this right places a duty on States to create legal and real conditions in which they can freely carry out their activities.

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[31] Case of *Huilca-Tecse v. Peru*, Judgment of 3 March 2005, of the Inter-American Court of Human Rights, para. 69.

[32] Ibid., paras. 70-71.

[33] Ibid., para. 77.

[34] Case of *Cantoral-Huamani and Garcia-Santa Cruz v. Peru*, Preliminary objection, merits, reparation and costs, 10 July 2007, order of the Inter-American Court of Human Rights, para. 144.

[35] Case of *Kawas Fernández v. Honduras*, Judgment of 3 April 2009, of the Inter-American Court of Human Rights, para. 145 (original available only in Spanish).

D. Jurisprudence of the European Court of Human Rights

44. The European Court of Human Rights has dealt with a number of cases relating to article 11 of the European Convention on Human Rights over the past years and has had a major influence on interpreting the right to freedom of association. Decisions of the Court have firmly established that there is a right under international law to form legally registered associations, and that, once formed, these organizations are entitled to broad legal protections.[36] Although most of the cases dealt with relate to political parties or trade unions, they have relevance for civil society organizations regarding the interpretation of the content of the right to freedom of association.

45. In *United Communist Party of Turkey and Others v. Turkey*, the Court held that Turkey could not dissolve a political party that had not engaged in illegal activities because the national authorities regarded it as undermining the constitutional structures of the State. The Court emphasized: "[t]he right guaranteed by art 11 would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention. It follows that the protection provided by art 11 lasts for an association's entire life and that dissolution of an association by a country's authorities must accordingly satisfy the requirements of paragraph 2 of that provision".[37]

46. In *Sidiropoulos and Others v. Greece*, the Court dealt with the right of individuals to register legally recognized associations. In holding that Greece could not refuse to register an association named the "Home of Macedonian Culture", the stated purposes of which were exclusively to preserve and develop the traditions of folk cultures of the Florina region, the Court found that "[t]he right to form and association is an inherent part of the right set forth in art 11, even if that article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning".[38]

47. In *Freedom and Democracy Party (ÖZDEP) v. Turkey*, the Court affirmed the nexus between the freedom of association and the freedom of opinion and expression: "[t]he protection of opinions and the freedom to express them is one of the freedoms of assembly and association as enshrined in art 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy".[39]

48. In the case of *Sigurdur A. Sigurjónsson v. Iceland*, the Court confirmed that art 11 of the Convention not only safeguards the positive right to form or to join an association, but also the right not to form or not to join an association. The Court held that "a large number of domestic systems contain safeguards which, in one way

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[36] Leon E. Irish, Karla W. Simon, "Freedom of association: recent developments regarding the 'Neglected Right'", *International Journal of Non-Profit Law*, vol. 3, issue 2, December 2000, p. 2.

[37] European Court of Human Rights, Reports of judgments and decisions, 1998-I, 30 January 1998, para. 33.

[38] European Court of Human Rights, Reports of judgments and decisions, 1998-IV, 10 July 1998, para. 40.

[39] European Court of Human Rights, 23885/94, 1999-VIII, para. 37.

or another, guarantee the negative aspect of the freedom of association, that is the freedom not to join or to withdraw from an association. A growing measure of common ground has emerged in this area also at the international level".[40]

49. In *Gorzelik and Others v. Poland*, the Court has underlined the importance, for the proper functioning of democracy, of associations formed for purposes other than political parties, "including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting minority consciousness".[41] The Court went on to recognize "that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities".[42]

IV. Human rights defenders and the right to freedom of association: interventions and positions of the Special Rapporteur

A. Main trends

50. The tendencies observed by the then Special Representative in her earlier report have not changed significantly over the past five years. The Special Rapporteur is concerned, however, that the ways and means applied in certain countries in order to restrict the activities of human rights organizations are now even more widely used in all regions of the world.

51. In the wake of the events of 11 September 2001, some Governments have introduced new and stricter counter-terrorism, security and anti-extremism laws. Such legislation often has a significant restrictive impact on the functioning of the civil society sector, especially on organizations monitoring human rights violations, and taking a critical stance of government actions and policies.

52. While article 22 of the International Covenant on Civil and Political Rights allows for the restriction of the right to freedom of association for the purposes of, among others, national security and safety, such restrictions must fulfil other conditions foreseen in article 22, paragraph 2, as described earlier. The Special Rapporteur notes that very often restrictions on freedom of association are proclaimed in government decrees and similar legislative acts, thus they do not conform to the requirement of being "prescribed by law". Furthermore, these laws increasingly contain rather vague and broadly defined provisions that easily lend themselves to misinterpretation or abuse. Security and anti-terrorism legislation should not be used to suppress activities aimed at the promotion and protection of human rights.

53. Some NGO framework laws adopted during the past five years introduced far-reaching restrictions on the ability of organizations to carry out their activities without interference. Registration authorities increasingly operate under significant government influence or control. NGO framework laws leave a broad margin of

[40] European Court of Human Rights, 27 October 1975, Series A, No. 19, para. 38.

[41] European Court of Human Rights, *Gorzelik and Others v. Poland*, No. 44158/98, 17 February 2004, para. 92.

[42] Ibid., para. 93.

discretion for the decisions of registration authorities often without providing adequate means to contest such decisions, and in many cases allowing for a complete lack of independent judicial oversight.

54. Instead of outright prohibiting NGO or human rights activity, Governments increasingly turn to more subtle means by trying to restrict civil society activities through the judiciary or public administration. Existing laws and regulations are often applied in a way by Governments and registration authorities that are highly detrimental to the independent functioning of a healthy civil society. Ambiguity of requirements, lack of transparency, burdensome and lengthy procedures all have the potential of restricting the right to freedom of association.

55. Some Governments openly interfere with the operation and functioning of civil society organizations, by directly appointing or removing members of the governing body of the organization or by prescribing that decisions taken by the board are valid only if a government representative participated at the relevant meeting.

56. The Special Rapporteur is concerned about the increasing use of slander laws and provisions by government officials to sanction critical statements and reports by human rights organizations. Numerous civil codes and anti-extremisms laws contain vague provisions such as "humiliating national pride" and "attacking the honour and dignity", which are often used to retaliate against critical human rights activities.

57. The Special Rapporteur wishes to underline that the promotion and protection of human rights is a legitimate purpose for an association to pursue, as recognized by article 1 of the Declaration on human rights defenders, which states that:

> "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."

58. Difficulties in the formation and registration of human rights associations; criminal sanctions for unregistered activities; government interference, supervision and monitoring of NGO activities; and difficulties in accessing funding may restrict the right to freedom of association and therefore must reach the very high threshold under article 22, paragraph 2, of the International Covenant on Civil and Political Rights in order to be admissible, as discussed earlier.

B. Difficulties in the formation and registration of human rights associations, and criminal sanctions for unregistered activities

59. There are essentially two types of regimes applied for civil society organizations wishing to obtain legal personality; the so-called "notification" and "registration" regimes. In the most liberal regulations, often referred to as a regime of "declaration" or "notification", NGOs are automatically granted legal personality upon receipt by the authorities of notification by the founders that an organization was created.[43] Other countries require the formal registration of organizations in order to be able to carry out activities as a legal entity. Although the registration requirement does not necessarily, in itself, violate the right to freedom of association, the Special Rapporteur concurs with the views of the Special Representative that registration should not be compulsory and that NGOs should be

[43] See A/59/401, para. 51.

allowed to exist and carry out collective activities without having to register if they so wish.[44] On the other hand, NGOs have the right to register as legal entities and to be entitled to the relevant benefits.

Criminal sanctions for unregistered activities

60. In many instances, however, any activities by informal groups are allowed only in case they have registered formally as legal entities. Developments in legislation in many countries over the past five years have been increasingly aimed at stifling civil society groups, and NGO framework laws are more and more used by certain Governments to reinforce this effect. One of the most disturbing trends is the criminalization of activities carried out by unregistered groups. The insistence by certain Governments that all groups must register, however small or informal they may be, reflects the intention to control their activities and filter those groups that are critical of government policies. In many countries similar laws have been introduced to outlaw already existing and functioning organizations.

61. In some cases, such criminal penalties may carry up to six months of detention, two years of prison sentences and excessive fines. In another country, all NGOs must register and sign an agreement with the Government before they are allowed to start their activities.

62. In one country, legislation imposes criminal sanctions for associating without registration. This applies also to informal activities of associations. The Special Rapporteur is extremely concerned that since this amendment was introduced in 2005, at least 17 members of NGOs have been imprisoned based on this article, and hundreds of others questioned by members of the police and security forces.

63. In another country the Non-Governmental Organizations Registration Act criminalizes unregistered activity by providing that an organization that carries out activity without a valid certificate of incorporation commits an offence and its director will be liable for a fine or imprisonment for up to six months.

64. The founding members of a human rights NGO have been prosecuted for engaging in civil society action without obtaining a licence. The punishment for the founders of the association could be up to three years in prison.

65. The Special Rapporteur wishes to underline that the criminalization of the participation in unregistered entities is contrary to the right to freedom of associations and violates a number of international human rights instruments. Imposing criminal sanctions for unregistered activities is very often exacerbated by lengthy, ambiguous and unpredictable registration requirements. Very often a long time, in some cases several years, elapses between the request for registration and the decision by the competent authorities. In certain cases the length of the registration process is artificially prolonged by the registration authorities with the aim of preventing human rights organizations from carrying out their activities and of silencing critical voices.

66. The relevant legislation should clarify the status of organizations in the period between the request for registration and the final decision. The Special Rapporteur stresses that pending such a final decision, human rights organizations should be free to start their activities.

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[44] See A/59/401, para. 82 (a).

Denial of registration and deregistration

67. Denial of registration for human rights associations and NGOs is the most extreme measure by Governments curtailing the right to freedom of association, especially in instances where activities carried out in the framework of unregistered entities carry criminal sanctions with it.

68. In the most restrictive environments, the right to association is not granted at all by the authorities. In certain countries the right to associate is not recognized by domestic laws, and as a result the few organizations that are able to carry out their work are mostly established by the Government.

69. A well-known human rights NGO in one country was repeatedly refused registration by the competent authorities despite the fact that the Human Rights Committee found that the refusal constituted a violation of article 22 of the International Covenant on Civil and Political Rights. In another country, since the existence of civil society organizations is not provided for by laws, human rights associations often register as another form of legal entity. One NGO was deregistered for having failed to denounce a statement by one of its founding members that had been considered extremist.

Burdensome and lengthy registration procedures

70. Burdensome, lengthy, arbitrary and expensive registration requirements may considerably hamper the activities of human rights associations, even in instances where registration is voluntary. Tactics used by Governments include exceedingly lengthy registration processes; burdensome and ever changing documentation requirements that associations are not able to fulfil; and excessive government control and discretion over the registration process. In some cases amendments to the existing legislation expand government discretion and require already functioning and registered organizations to re-register.

71. Overly vague legislation also easily lends itself to abuse and discretionary interpretation by registration officials. This may result in unreasonably lengthy registration processes and repeated requests for submission of documents not originally foreseen by the relevant law. The imposition of several (new) layers of bureaucracy may lead to implementation problems and originally unforeseen delays in the registration process.

72. In a certain country registrations have been in effect suspended owing to the overly discretionary implementation of registration laws. In another country the draft NGO law foresees a registration process without establishing clear procedures and timelines for the government review of applications. In other cases the law governing the registration of civil society organizations gives a role to a large number of authorities in the process, thereby significantly slowing down the registration process. In one instance, the applications for registration have to be filed with a local office of the Ministry for Social Development, which in return forwards it to the Controller of the Registry of Societies, which, after having approved the request, passes it on to the relevant minister, who has practically unlimited discretion to accept or deny the registration. Lengthy, burdensome and overly bureaucratic registration processes can in effect deter associations from seeking registration, thereby preventing their effective functioning.

73. In some cases the costs related to the registration process make it increasingly difficult for civil society organizations to initiate or maintain their registrations. Besides registration costs, other bureaucratic requirements, such as the provision of quarterly financial reports to the registering authority, may also pose unsustainable burdens on some organizations.

74. In certain countries NGOs are required to re-register in certain periods, be it every year or more often, which provides additional opportunities for Governments to prohibit the operation of groups whose activities are not approved by the Government. Requirements for periodic re-registration may also induce a level of insecurity in human rights organizations, resulting in self-censorship and intimidation.

C. Restrictions on the registration of international NGOs

75. While only a minority of countries denies foreign human rights defenders the right to associate freely, in many they are subjected to a separate and more restrictive regime.[45] In certain countries foreign nationals or persons without citizenship are required to be physically present in the territory of the country in order to be able to found an organization, and registration authorities have broad discretionary powers to refuse registration of foreign human rights organization. In one country a 2007 Law on Public Associations required that all local and international NGOs re-register by the end of the year. Owing to the excessively high level of bureaucratic scrutiny, the number of registered NGOs dropped by two thirds.

76. In another country, any work by foreign NGOs in the fields of the advancement of human and democratic rights; the promotion of equality of nations, nationalities and peoples and that of gender and religion; the promotion of the rights of the disabled and children's rights; the promotion of conflict resolution or reconciliation; and the promotion of justice and law enforcement services is deemed illegal without the written consent of the Government.

D. Restriction on activities: government supervision and monitoring

77. Many NGO laws adopted during the past five years empower government officials to interfere with the internal management and activities of NGOs.

State scrutiny of the management and internal governance of organizations

78. According to the Law on Societies in a certain country, the elections to the board of directors and decisions taken by the general body of an NGO take effect only if the supervising ministry had been notified and had not objected to the decision. According to an NGO framework law, the position of sector administrator was created, who has the power to supervise and control operational activities of charities and societies. The law also allows the registration agency to suspend officers of the organization, or require the assignment of another person as an officer, with or without a cause.

[45] See A/59/401, para. 62.

State scrutiny of objectives and activities of organizations

79. Several laws place restrictions on the types of activities that civil society organizations are allowed to carry out without prior government approval. NGO framework laws containing lists of permitted or prohibited activities for civil society organizations are extremely problematic, as the often rather vague formulations of such provisions lend themselves to discretionary interpretation by the relevant government organs and may be used to curtail activities of civil society organizations that are critical of government policies or practice.

80. In one country a draft law would have required NGOs to give seven days' notice in writing of any intention to make direct contact with people in any part of the rural areas of the country. In another country a proposed draft law would have outlawed attempts of political influence on others, as well as preaching religious conversion or speaking for or against religions.

81. In a certain country organizations that receive more than 10 per cent of their funding from abroad are prohibited from carrying out a wide range of activities, such as the promotion of the rights of children and persons living with disabilities; conflict resolution; and the promotion of justice and law enforcement services.

82. Emergency, security, anti-terrorism and anti-extremism laws are also being used increasingly by certain Governments in order to restrict activities of civil society.

83. The Special Rapporteur has received an increasing number of allegations of interference by State agents, in most cases by the security and police forces. The offices of an NGO defending the rights of lesbian, gay, bisexual and transgender people were raided by plain clothes police officers, on suspicion that the organization was facilitating prostitution. The offices of a trade union were raided by police officers without a search warrant, the documents and equipment were confiscated and the premises were sealed. In the same country the Government thoroughly investigated 800 civil society organizations in 2004 and issued warnings to them. National security agencies of another country questioned and searched NGOs and confiscated publications and documents from their premises.

E. Administrative and judicial harassment: grounds and procedures for dissolution

84. Discretionary interpretation of existing laws has allowed Governments to initiate legal proceedings against human rights organizations for even minor infractions or to dissolve them without appropriate remedies and judicial oversight. The NGO law of a country allows for the Government to involuntarily dissolve civil society organizations for having departed or not having completely fulfilled the goals for which it was established; for its membership falling below the minimum required number; and for the failure to present operational plans for two consecutive reporting periods. Some countries even prescribe criminal penalties for administrative infractions. In certain cases the decisions of the registration agency are not subject to the right of appeal in a court.

85. The local offices of an international human rights NGO were accused of illegal fund-raising, its bank accounts were frozen and it was ordered to pay a fine.

86. In another country, a human rights defender working on community health and disease prevention was charged under the Special Public Security Act and Unlawful Activities Prevention Act for allegedly communicating with insurgents. He was detained for 22 months before the Supreme Court granted him bail.

87. Two human rights defenders were arrested by agents of the national intelligence agency and held in incommunicado detention for four weeks. About a month later they were released on bail, but was summoned by the prosecutor soon afterwards. The prosecutor reportedly threatened them with re-incarceration if they continued with their trade union activities and ordered them to appear before him every Friday for an indefinite period.

88. The Minister of the Interior of another country brought a lawsuit against a prominent human rights defender for slanderous statements causing "moral damage" and "attacking the honour and dignity" of the police and the minister. This may have been in reaction to the denunciation by the human rights defender of unfair trials and abuses committed by police officers. A journalist working on behalf of political prisoners and reporting on torture and ill-treatment in prisons was sued by the prison administration for "honour and business reputation protection" under the civil code.

89. Charges were brought against an association gathering mothers of victims of a hostage-taking for extremist activities. The amended law on extremism of the country broadens the definition of extremism to include "slander of public officials" and "humiliating national pride". The legislation can be applied retroactively, and allows for suspension of activities that took place before the amendment to the law was introduced.

90. Prosecutors also use "official warnings" against human rights defenders, often under anti-extremism or anti-terrorism laws, in order to deter them from further activities. Sweeping searches and confiscation of documents are increasingly frequent in certain parts of the world.

F. Access to funding

91. Access to funding, the ability of human rights organizations to solicit, receive and use funding, is an inherent element of the right to freedom of association. In order for human rights organizations to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediments, including funding restrictions.

92. Article 13 of the Declaration on human rights defenders states that:

> "Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration."

93. According to the provisions of the Declaration, States are under obligation to permit individuals and organizations to solicit, receive and utilize funding. However, one or several of the three phases of the funding cycle are very often curtailed.

94. Many countries have put in place legislation that significantly restricts the ability of human rights organizations to seek and receive funding, especially foreign

funding. There may be various reasons for a Government to restrict foreign funding, including the prevention of money-laundering and terrorist financing, or increasing the effectiveness of foreign aid. The Special Rapporteur is concerned, however, that in many cases such justifications are merely rhetorical and the real intention of Governments is to restrict the ability of human rights organizations to carry out their legitimate work in defence of human rights.

95. Some Governments have introduced a complete prohibition on certain types of funding; for example, that coming from United Nations agencies or other bilateral donors. In other instances, organizations working in particular fields are prohibited from receiving foreign funding. For example, in one country NGOs working on governance issues are prohibited from receiving foreign funding. Another Government prohibits foreign assistance that may have the potential of "causing anxiety and disorder of national and regional economy". One registration authority may deny the transfer of foreign funds for the purposes of "protecting the basis of the Constitutional system, morality, health, rights and lawful interests of other persons, and with the aim of defending the country and state security".

96. In many countries NGOs are required to receive prior permission from the Government in order to receive foreign funding, and in some extreme cases government authorization is required even to apply for such funds. A human rights organization received a dissolution order for allegedly having received foreign funding without authorization. When the organization in question reportedly notified the relevant authorities of the funds it was about to receive and had not received a response within the timeframe prescribed by law, it considered the foreign funding as approved by the Government.

97. Certain Governments require that foreign development assistance and funding for NGOs be channelled through a government fund or be deposited in a bank designated and fully controlled by the Government. In one case, NGOs receiving funding from abroad in foreign currency are obliged to deposit it in the central bank of the country.

98. There are further restrictions applied on the utilization of the funding received, which in some countries may be significantly restricted. In one country NGOs that receive more than 10 per cent of its funding from foreign sources, including from nationals of that country living abroad, are expressly banned from carrying out any work related to: the advancement of human and democratic rights; the promotion of equality of nations, nationalities and peoples and that of gender and religion; the promotion of the rights of the disabled and children's rights; the promotion of conflict resolution or reconciliation; and the promotion of justice and law enforcement services. Such restrictions severely infringe on the ability of the organizations to carry out their activities without undue interference.

99. Tax laws and regulations are also frequently used to hinder the work of human rights organizations and disproportionately affect them. In many countries donations to not-for-profit organizations, including human rights organizations, are exempt from taxation. Although providing a tax exempt status is not a requirement under the right to freedom of association, the Special Rapporteur is of the view that Governments should not have in place different taxation regimes for human rights organizations and other not-for-profit associations. In one case a so-called white list of donors had been established, and funding from foreign donors not included on the approved list was taxed up to 24 per cent. Another country amended its tax code and

eliminated value added tax exemptions for NGOs, which had a substantial impact on spending available for programme activities.

100. Extensive scrutiny by tax authorities and abuse of fiscal procedures are also often experienced by NGOs critical of the Government. One human rights NGO faced provisions by prosecutors claiming that it owed taxes on income that was exempt from taxation under national law.

V. Conclusions and recommendations

101. **The Special Rapporteur commends countries that have created an enabling environment in which NGOs operate, especially those that make it easy for them to register, which impose less restrictions, whose procedures are not cumbersome and further allow appeal or review processes and foreign funding.**

102. **The Special Rapporteur makes the following recommendations.**

103. **The Special Rapporteur believes that it should be permissible for individuals to join together to engage in lawful activities without having to register as legal entities, in accordance with the provisions of article 22 of the International Covenant on Civil and Political Rights and article 5 of the Declaration of human rights defenders, if they so wish.**

104. **States should not criminalize or impose criminal penalties for activities in defence of human rights and for participating in unregistered entities.**

105. **Laws governing the creation, registration and functioning of civil society organizations should be written and should set up clear, consistent and simple criteria to register or to incorporate a civil society organization as a legal person. Non-governmental organizations that meet all prescribed administrative criteria should be immediately able to register as legal entities.**

106. **States should ensure that existing laws and regulations are applied in an independent, transparent and less burdensome or lengthy manner in order to avoid restricting the right to freedom of association.**

107. **States must ensure that any restriction regarding the registration of organizations is fully compatible with article 22 of the International Covenant on Civil and Political Rights.**

108. **In the event of the adoption of a new law, all previously registered NGOs should be considered as continuing to operate legally and be provided with accelerated procedures to update their registration.**

109. **Unless a new law is adopted, existing laws governing the registration of civil society organizations should not require that organizations re-register periodically.**

110. **The registration process should be prompt and expeditious, easily accessible and inexpensive.**

111. **Clear procedures and timelines for government review of applications should be established. Lengthy, burdensome and overly bureaucratic registration processes affecting effective functioning should be avoided.**

112. **States should not impose costs related to the registration process making it difficult for NGOs to maintain their registration or place other provisions that cause unsustainable burdens.**

113. **States should guarantee the right of an association to appeal against any refusal of registration. Effective and prompt recourse against any rejection of application and independent judicial review regarding the decisions of the registration authority is necessary to ensure that the laws governing the registration process are not used as obstacles to the right to freedom of association.**

114. **The registration authority should be allowed to involuntarily terminate an NGO only for the most flagrant violations, and all involuntary terminations should be subject to judicial review.**

115. **States should put in place a single, publicly accessible registry for civil society organizations.**

116. **Registering bodies should be independent from the Government and should include representatives of civil society.**

117. **Reporting obligations required from NGOs should be simple, uniform and predictable.**

118. **Sanctions for the failure of filing reports or complying with other provisions of the law governing civil society organizations should provide for adequate warning and an opportunity to correct such administrative infractions. States should not criminalize non-compliance with the law governing civil society organizations.**

119. **The registering and supervisory organs should have the right to examine the books, records and activities of civil society organizations only during ordinary business hours, with adequate advance notice. Such auditing and supervisory powers should not be used arbitrarily and for the harassment or intimidation of organizations. Police and other law enforcement agencies should only conduct raids on offices and confiscate documents or equipment of NGOs in possession of a valid search warrant or other applicable court authorization, and allowing the presence of an attorney.**

120. **Extensive scrutiny by tax authorities and abuse of fiscal procedures by the States should be disallowed.**

121. **States should not interfere with the internal management and activities of NGOs. The validity of decisions by the management board should not be conditional on the presence of a government representative at the board meeting.**

122. **Human rights organizations that are independent and whose objectives and activities are not in violation of the International Covenant on Civil and Political Rights should have the right to engage in activities for the benefit of their members and for the public; and should be free to participate in public policy debates, including debates about and criticism of existing or proposed State policies or actions. Any limitations, within these parameters, including lists of permitted and prohibited activities, are incompatible with the right to freedom of association. Accordingly, no distinction regarding the types of**

permitted activities should be made between national and foreign organizations.

123. **Governments must allow access by NGOs to foreign funding, and such access may only be restricted in the interest of transparency, and in compliance with generally applicable foreign exchange and customs laws. Restrictions on foreign funding may limit the independence and effectiveness of NGOs. States should therefore review existing laws in order to facilitate access to funding.**

124. **States should not require prior governmental authorization to apply for or receive funding from abroad.**

125. **Human rights NGOs should be permitted to engage in all legally acceptable fund-raising activities under the same regulations that apply to other non-profit organizations in general. Fund-raising through public solicitation methods may require registration with a State organ or independent supervisory organ on equal footing for all non-profit organizations.**

126. **Foreign NGOs carrying out human rights activities should be subject to the same set of rules that apply to national NGOs; separate registration and operational requirements should be avoided.**

127. **Vague definitions of terrorism, extremist activities and slander provisions allow for arbitrary application against individuals and associations and should be amended. The use of slander laws and other provisions by Government officials to sanction critical statements and reports by human rights NGOs should be eliminated.**